

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW KROPP,
Plaintiff,

v.

JEFFERY SCOTT,
Defendant.

Case No. [18-cv-01549-JCS](#) (PR)

ORDER OF SERVICE;

**ORDER DIRECTING DEFENDANT
TO FILE A DISPOSITIVE MOTION
OR NOTICE REGARDING SUCH
MOTION;**

INSTRUCTIONS TO CLERK

Dkt. No. 9

INTRODUCTION

Plaintiff alleges in this federal civil rights action under 42 U.S.C. § 1983 that a prison guard at Pelican Bay State Prison used excessive force against him in violation of the Eighth Amendment.¹

The complaint states cognizable claims. Therefore, in response to the complaint, defendant is directed to file a dispositive motion or notice regarding such motion on or before **September 24, 2018**. The Court further directs defendant to adhere to the notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.

¹ Plaintiff consented to magistrate judge jurisdiction. (Dkt. No. 7.)

DISCUSSION

A. Standard of Review

In its initial review of this pro se complaint, this Court must dismiss any claim that is frivolous or malicious, or fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e). Pro se pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

B. Legal Claims

Plaintiff alleges that on March 9, 2017 Pelican Bay prison guard Jeffrey Scott used excessive force against him by shooting him without justification. When liberally construed, these allegations state cognizable claims. Plaintiff also alleges a state tort claim of intentional infliction of emotional distress. This claim shall proceed in this action.

MOTION FOR THE APPOINTMENT OF COUNSEL

The motion for the appointment of counsel is DENIED without prejudice to plaintiff renewing his motion after defendant has responded to the complaint. (Dkt. No. 9.) This case does not present factually or legally complex issues and plaintiff has filed clearly written and well-reasoned filings without assistance. *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984) (the decision to request counsel to represent an indigent litigant under 28 U.S.C. § 1915 is within “the sound discretion of the trial court and is granted only in

1 exceptional circumstances.”).

2 **CONCLUSION**

3 For the foregoing reasons, the Court orders as follows:

4 1. The Clerk of the Court shall issue summons and a Magistrate Judge
5 jurisdiction consent form and the United States Marshal shall serve these forms, without
6 prepayment of fees, along with a copy of the operative complaint in this matter (Dkt. No.
7 1), all attachments thereto, and a copy of this order upon Correctional Officer Jeffrey Scott
8 at Pelican Bay State Prison. The Clerk shall also mail courtesy copies of the complaint
9 and this order to the California Attorney General’s Office.

10 2. On or before **September 24, 2018**, defendant shall file a motion for
11 summary judgment or other dispositive motion with respect to the claims in the complaint
12 found to be cognizable above.

13 a. If defendant elects to file a motion to dismiss on the grounds plaintiff
14 failed to exhaust his available administrative remedies as required by 42 U.S.C.
15 § 1997e(a), defendant shall do so in a motion for summary judgment, as required by
16 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

17 b. Any motion for summary judgment shall be supported by adequate
18 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
19 Civil Procedure. Defendant is advised that summary judgment cannot be granted, nor
20 qualified immunity found, if material facts are in dispute. If any defendant is of the
21 opinion that this case cannot be resolved by summary judgment, he shall so inform the
22 Court prior to the date the summary judgment motion is due.

23 3. Plaintiff’s opposition to the dispositive motion shall be filed with the Court
24 and served on defendant no later than forty-five (45) days from the date defendant’s
25 motion is filed.

26 4. Defendant shall file a reply brief no later than fifteen (15) days after
27 plaintiff’s opposition is filed.
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1 5. The motion shall be deemed submitted as of the date the reply brief is due.
2 No hearing will be held on the motion unless the Court so orders at a later date.

3 6. All communications by the plaintiff with the Court must be served on
4 defendant, or defendant's counsel once counsel has been designated, by mailing a true
5 copy of the document to defendant or defendant's counsel.

6 7. Discovery may be taken in accordance with the Federal Rules of Civil
7 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
8 Rule 16-1 is required before the parties may conduct discovery.

9 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
10 Court informed of any change of address and must comply with the Court's orders in a
11 timely fashion. Failure to do so may result in the dismissal of this action for failure to
12 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

13 9. Extensions of time must be filed no later than the deadline sought to be
14 extended and must be accompanied by a showing of good cause.

15 10. A decision from the Ninth Circuit requires that pro se prisoner-plaintiffs
16 be given "notice of what is required of them in order to oppose" summary judgment
17 motions at the time of filing of the motions, rather than when the court orders service of
18 process or otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 939-41
19 (9th Cir. 2012). Defendants shall provide the following notice to plaintiff when they file
20 and serve any motion for summary judgment:

21 The defendants have made a motion for summary judgment by which they
22 seek to have your case dismissed. A motion for summary judgment under
23 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
24 case.

25 Rule 56 tells you what you must do in order to oppose a motion for
26 summary judgment. Generally, summary judgment must be granted when
27 there is no genuine issue of material fact — that is, if there is no real
28 dispute about any fact that would affect the result of your case, the party
 who asked for summary judgment is entitled to judgment as a matter of
 law, which will end your case. When a party you are suing makes a motion
 for summary judgment that is properly supported by declarations (or other

1 sworn testimony), you cannot simply rely on what your complaint says.
2 Instead, you must set out specific facts in declarations, depositions, answers
3 to interrogatories, or authenticated documents, as provided in Rule 56(e),
4 that contradict the facts shown in the defendants' declarations and
5 documents and show that there is a genuine issue of material fact for trial.
6 If you do not submit your own evidence in opposition, summary judgment,
7 if appropriate,
8 may be entered against you. If summary judgment is granted, your case
9 will be dismissed and there will be no trial.

10 *Rand v. Rowland*, 154 F.3d 952, 962-963 (9th Cir. 1998).

11 11. Plaintiff's motion for the appointment of counsel is DENIED without
12 prejudice. (Dkt. No. 9.)

13 12. The Clerk shall terminate Dkt. No. 9.

14 **IT IS SO ORDERED.**

15 **Dated:** June 13, 2018

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JOSEPH C. SPERO
Chief Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW KROPP,
Plaintiff,

v.

JEFFERY SCOTT,
Defendant.

Case No. [18-cv-01549-JCS](#)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 13, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Matthew Kropp ID: T-46877
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532

Dated: June 13, 2018

Susan Y. Soong
Clerk, United States District Court

By: Karen L. Hom
Karen Hom, Deputy Clerk to the
Honorable JOSEPH C. SPERO